



## **Texas Department of Insurance**

### **Division of Workers' Compensation**

Medical Fee Dispute Resolution, MS-48

7551 Metro Center Drive, Suite 100 • Austin, Texas 78744-1645

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## **MEDICAL FEE DISPUTE RESOLUTION FINDINGS AND DECISION**

### **GENERAL INFORMATION**

#### **Requestor Name and Address**

KIRT REPP DC  
PO BOX 9973  
THE WOODLANDS TX 77387

#### **Respondent Name**

AMERICAN ZURICH INSURANCE CO

#### **Carrier's Austin Representative**

Box Number 19

#### **MFDR Tracking Number**

M4-12-2785-01

#### **MFDR Date Received**

APRIL 27, 2012

### **REQUESTOR'S POSITION SUMMARY**

**Requestor's Position Summary:** "The reason a 'Request for Reconsideration' was necessary was due to the fact that we clearly provided and billed for 4 units of 95903 and the carrier only referenced and only paid for 1 unit of 95903 leaving no adjudication for the remaining 3 units of 95903 as explained."

**Amount in Dispute:** \$885.00

### **RESPONDENT'S POSITION SUMMARY**

**Respondent's Position Summary:** "The provider in this case appears to be a doctor of chiropractic medicine. The healthcare services in dispute include needle electrodiagnostic studies. In a recent decision, the Third Court of Appeals determined that chiropractors are not authorized by their license to perform needle electrodiagnostic studies...In addition, the carrier relies upon its review and reduction of the provider's bill as reflected in its EOBs. The carrier asserts that it has paid according to applicable fee guidelines. All reductions of the disputed charges were appropriately made."

**Response Submitted By:** Flahive, Ogden & Latson

### **SUMMARY OF FINDINGS**

| Dates of Service | Disputed Services   | Amount In Dispute | Amount Due |
|------------------|---------------------|-------------------|------------|
| May 27, 2011     | CPT Code 95903 (x3) | \$885.00          | \$321.84   |

### **FINDINGS AND DECISION**

This medical fee dispute is decided pursuant to Texas Labor Code §413.031 and all applicable, adopted rules of the Texas Department of Insurance, Division of Workers' Compensation.

#### **Background**

1. 28 Texas Administrative Code §133.307, effective May 25, 2008, 33 *Texas Register* 3954, sets out the procedures for resolving medical fee disputes.
2. 28 Texas Administrative Code §134.203, effective March 1, 2008, 33 *Texas Register* 364, sets the reimbursement guidelines for the disputed service.
3. 22 Texas Administrative Code §75, effective December 24, 2009, 34 *Texas Register* 9208, sets out the scope of practice for chiropractors.

4. District Court of Travis County, 250<sup>th</sup> Judicial District No. D-1-N-GN-06-003451, Honorable Stephen Yelenosky, Judge Presiding, Order on cross-motions for partial summary judgment dated November 24, 2009.
5. Texas Court of Appeals, Third District at Austin, NO. 03-10-00673-CV, Opinion dated April 5, 2012.
6. Texas Court of Appeals, Third District at Austin, NO. 03-10-00673-CV, Mandate dated August 8, 2013.
7. The services in dispute were reduced/denied by the respondent with the following reason codes:

Explanation of benefits

- W1-Workers' compensation jurisdictional fee schedule adjustment.
- 790-This charge was reimbursed in accordance to the Texas medical fee guideline.
- 18-Duplicate claim/service
- 224-Duplicate charge

### **Litigation Background for Needle EMG and MUA**

Portions of the Texas Board of Chiropractic Examiners rules of practice were challenged by the Texas Medical Association and the Texas Medical Board in 2009. At issue was whether 22 Texas Administrative Code §75.17(a)(3), (c)(2)(D), (c)(3)(A), and (e)(2)(O) were within the scope of chiropractic practice in Texas. Specifically, the parties sought judgment on whether rules allowing Chiropractors to perform needle electromyography (EMG) and manipulation under anesthesia (MUA) were valid. On November 24, 2009, the 345th District Court issued a judgment in which presiding judge Honorable Stephen Yelenosky concluded that needle EMG and MUA exceeded the statutory scope of chiropractic practice in Texas. The Texas Board of Chiropractic Examiners appealed the district court's judgment to the Texas Court of Appeals, Third District. The Texas Court of Appeals in *Tex. Bd. Of Chiropractic Examiners v. Tex. Med. Ass'n.*, 375 S.W.3d 464 (Tex. App. – Austin, 2012, pet. den.) issued an opinion affirming the district court's judgment, and concluding that needle EMG and MUA services are not within the chiropractic scope-of-practice. The Chiropractic Board exhausted its appeals and on August 8, 2013, the mandate affirming the district court's judgment was issued. The mandate states "...we affirm the remainder of the district court's judgment that subparts 75.17(a)(3), (c)(2)(D), (c)(3)(A), and (e)(2)(O) of the Texas Board of Chiropractic Examiners' scope-of-practice rule are void." In accordance with the Texas Court of Appeals opinion, the final mandate, and the scope of chiropractic practice requirement in 28 Texas Administrative Code §134.203(a)(6), needle EMG and MUA services may not be reimbursed.

### **Issues**

1. Is the rendering provider eligible to perform nerve conduction tests?
2. Is the requestor entitled to reimbursement for CPT code 95903?

### **Findings**

1. Disputed services, CPT code 95903, fall in the category of nerve conduction tests under applicable AMA current procedural terminology (CPT). This test involves placing a stimulating electrode directly over the nerve to be tested. This is a surface test that does not involve needles. According to the medical documentation found, this service was performed by Kirt Repp, D.C. (Doctor of Chiropractic). As stated in the Texas Court of Appeals, Third District at Austin, NO. 03-10-00673-CV, Opinion dated April 5, 2012

In the second provision, paragraph(c)(3)(A), TBCE imposed certification and supervision requirements on any licenses who administered "electro-neuro diagnostic testing" that varied according to whether the testing was "surface (non-needle)" or involved the use of needles. The import or effect of paragraphs (c)(2)(D) and (c)(3)(A), as the parties agree, was that chiropractors with specified training and certification could utilize needle EMG in evaluating or examining patients. In their live petitions and summary-judgment motions, the Physician Parties challenged the validity of the two rule provisions **specifically addressing needle EMG** [emphasis added]- 75.17(c)(2)(D) and (c)(3)(A) – plus the general standard regarding use of needles-75.17(a)(3)."

That is, surface tests were not in question during this suit. Pursuant to §75.17(c)(3)(A) effective December 24, 2009, 34 *Texas Register* 9208, services 95903, is within the scope of chiropractic practice because it is a surface tests. Reimbursement is recommended for this service.

2. Because CPT code 95903 is within the scope of chiropractic practice reimbursement is recommended in accordance with 28 Texas Administrative Code §134.203(c).

Per 28 Texas Administrative Code §134.203(c)(1)(2), "To determine the MAR for professional services, system participants shall apply the Medicare payment policies with minimal modifications.

(1) For service categories of Evaluation & Management, General Medicine, Physical Medicine and Rehabilitation, Radiology, Pathology, Anesthesia, and Surgery when performed in an office setting, the

established conversion factor to be applied is \$52.83. For Surgery when performed in a facility setting, the established conversion factor to be applied is \$66.32.

(2) The conversion factors listed in paragraph (1) of this subsection shall be the conversion factors for calendar year 2008. Subsequent year's conversion factors shall be determined by applying the annual percentage adjustment of the Medicare Economic Index (MEI) to the previous year's conversion factors, and shall be effective January 1st of the new calendar year. The following hypothetical example illustrates this annual adjustment activity if the Division had been using this MEI annual percentage adjustment: The 2006 Division conversion factor of \$50.83 (with the exception of surgery) would have been multiplied by the 2007 MEI annual percentage increase of 2.1 percent, resulting in the \$51.90 (with the exception of surgery) Division conversion factor in 2007."

To determine the MAR the following formula is used: (DWC Conversion Factor/Medicare Conversion Factor) X Participating Amount = Maximum Allowable Reimbursement (MAR).

The 2011 DWC conversion factor for this service is 54.54

The Medicare Conversion Factor is 33.9764

Review of Box 32 on the CMS-1500 the services were rendered in zip code 77384, which is located in Conroe, Texas. Therefore, the Medicare participating amount will be based on the reimbursement for locality 0440299-Rest of Texas.

The 2011 Medicare participating amount for CPT code 95903 is \$66.83

Using the above formula, the Division finds the MAR is \$107.28. The requestor billed for 3 units; therefore, the total allowable is \$321.84

### **Conclusion**

For the reasons stated above, the Division finds that the requestor has established that reimbursement is due for the specified services. As a result, the amount ordered is \$321.84.

### ***ORDER***

Based upon the documentation submitted by the parties and in accordance with the provisions of Texas Labor Code Sections 413.031 and 413.019 (if applicable), the Division has determined that the requestor is entitled to additional reimbursement for the services involved in this dispute. The Division hereby ORDERS the respondent to remit to the requestor the amount of \$321.84 plus applicable accrued interest per 28 Texas Administrative Code §134.130, due within 30 days of receipt of this Order.

### **Authorized Signature**

|                    |   |                           |
|--------------------|---|---------------------------|
| _____<br>Signature | _____<br>Medical Fee Dispute Resolution Officer | 9/6/2013<br>_____<br>Date |
|--------------------|---|---------------------------|

### ***YOUR RIGHT TO APPEAL***

Either party to this medical fee dispute has a right to request an appeal. A request for hearing must be in writing and it must be received by the DWC Chief Clerk of Proceedings within **20** (twenty) days of your receipt of this decision. A request for hearing should be sent to: Chief Clerk of Proceedings, Texas Department of Insurance, Division of Workers Compensation, P.O. Box 17787, Austin, Texas, 78744. **Please include a copy of the Medical Fee Dispute Resolution Findings and Decision** together with other required information specified in Division rule at 28 Tex. Admin. Code §148.3(c).

Under Texas Labor Code § 413.0311, your appeal will be handled by a Division hearing under Title 28 Texas Administrative Code Chapter 142 rules if the total amount sought does not exceed \$2,000. If the total amount sought exceeds \$2,000, a hearing will be conducted by the State Office of Administrative Hearings under Texas Labor Code §413.031.

**Si prefiere hablar con una persona en español acerca de ésta correspondencia, favor de llamar a 512-804-4812.**